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~~No. 21,465~~

IN THE

United States Court of Appeals

For the Ninth Circuit

MARTHA G. WHITFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Order of the United States District Court for the Eastern District of California Refusing to Correct or Reduce Sentence

BRIEF FOR THE APPELLANT

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OPINION BELOW

The District Court denied Appellant's motion to reduce, and correct its sentence on her conviction under the net worth theory of two counts of her indictment under 26 U.S.C. 7201 for willful attempt to evade and defeat income taxes. (R. 137.)

JURISDICTION

This is an appeal by the defendant, Martha G. Whitfield, from the refusal of the District Court to reduce and correct a sentence of one year given the

defendant by said District Court on two counts under 26 U.S.C. Section 7201 for willfully attempting to evade income taxes. Appellant was convicted under the dubious "net worth method." The sentences were to run concurrently. Jurisdiction in this case was conferred by 47 Statutes, 904 as amended; Rules 32 and 35 Federal Rules of Criminal Procedure; Eighth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. 1291; 18 U.S.C. 3651; and 18 U.S.C. 3231.

QUESTIONS PRESENTED

1. Did the lower court abuse its discretion and commit reversible error in denying Appellant's motion to vacate, reduce, or correct her sentence under Rule 35 of Federal Rules of Criminal Procedure where such denial was made on the erroneous ground that Appellant was not entitled to probation after a plea of not guilty and conviction unless she first admitted her alleged guilt or that she "had done something wrong" prior to passing on her application for probation and sentencing?

2. Did the District Court err in refusing to consider evidence dehors the record as shown by affidavits filed by the defendant on a motion to correct and reduce sentence showing that the defendant's husband was making seven times the net income claimed by the Government during the seven year period prior to the defendant's husband's death and that other witnesses for the Government had given false testimony?

STATUTES INVOLVED

Internal Revenue Code of 1954, Section 7201; Rules 32 and 35 Federal Rules of Criminal Procedure; Eighth and Fourteenth Amendments to the Constitution of the United States; 18 U.S.C. 3651; 18 U.S.C. 3231; and 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an appeal from the order of the District Court dated December 18, 1967 under Rules 35, F.R. C.P.* refusing to grant Appellant's motion to reduce and correct her sentence of conviction for willfully attempting to evade her income taxes for the year 1958 in the amount of $32,527.44 and 1959 in the amount of $8,995.45. (Probation Report dated December 1, 1965, Exhibit 29, page 1.) After Appellant's conviction and before sentence Appellant had asked the District Court for probation. The District Court refused to grant probation *or even to consider probation on* the ground that the Appellant had plead not guilty, stood trial, still maintained her innocence, and desired to appeal the District Court's sentence to this Court and would not admit she "had done something wrong" prior to her sentence by the District Court.

Appellant based her motion to reduce sentence and correct her sentence on the ground that the District Court erroneously abused its discretion in refusing to

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*"The court may correct a sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for herein for reduction of sentence . . ." Rule 35, F.R.C.P.

grant Appellant probation because after her conviction and before her sentence she would not "confess" to the probation officer and the District Court that she was guilty, perjured herself at the trial, thus, waiving her constitutional right to appeal to this Court and eventually to the Supreme Court of the United States.

Appellant's conviction in the District Court was obtained under the dubious and oft criticised "net worth theory" regarding which we later cite but one of the many criticisms of this method of obtaining convictions in income tax violations.

A brief statement of the facts leading up to the defendant's conviction is here briefly set forth. Appellant and her husband moved to Delano, California in 1940. (R.T. 293, lines 23-25.) They purchased a site and installed underground storage tanks and a bulk plant for use in the operation of a wholesale distributorship of gas and oil for Associated Oil Company. (R.T. 294-295.) Defendant's husband was the wholesale distributor for such large customers as DiGiorgio Farms, Roma Wine Company, and eleven service stations in the Delano area. About a year later they built their home on this property, and in 1947 they discontinued the oil distribution business and built a 14-unit motel on a portion of the premises. (R.T. 295, lines 15-25.) In April of 1948, about two or three weeks after these first motel units were opened, Mr. Whitfield died. (R.T. 301, lines 6-11.) In 1951 or 1952 Appellant converted the bulk plant to 8 additional units. (R.T. 296, lines 2-25.) In 1954 or 1955 Appel-

lant added 8 more units to the motel, resulting in a total of 30 units. (R.T. 297.) All of these units were built pursuant to the original plans dated February 11, 1947. (R.T. 299.) In 1953 Appellant developed additional plans for a swimming pool and lounge. (R.T. 300.) Appellant was advised by friends of her husband not to build the swimming pool and lounge at this time and so she built the final 8 units instead. (R.T. 297, lines 9-14.) The swimming pool and lounge were eventually built during 1958 and 1959. (R.T. 310, lines 3-5.) All of the above described motel facilities were operated as the Hal Mar Motel.

On February 10, 1961, Appellant was contacted by special agents of the Intelligence Division of the Internal Revenue Service at the Hal Mar Motel in Delano, California.

On May 22, 1961 these special agents interviewed Appellant and questioned her concerning the currency of $109,000.00 which she had reported in a delinquent Federal estate tax return. (R.T. 79, lines 19-20 and R.T. 81, lines 16-18.)

On March 31, 1964, an indictment was filed in two counts charging that on or about April 7, 1959 and on or about April 8, 1960 Appellant willfully and knowingly attempted to evade and defeat income taxes for the calendar years 1958 and 1959, respectively, by filing false and fraudulent income tax returns. (R. 2.)

The Government contended at the trial that the Appellant's husband made less than $3,000.00 a year or a total of $20,529.82 for the seven year period after

arriving in Delano and prior to his death in 1948 and, therefore, could not have accumulated this hoard of $109,000.00.

Appellant was convicted and sentenced December 6, 1965 after being denied probation. She then appealed to this Court which affirmed her sentence. Appellant then moved to reduce and correct her sentence, which the District Court denied on December 18, 1967. (R.T. Dec. 18, 1967, page 32.)

On Appellant's motion to correct and reduce sentence heard December 18, 1967 Appellant introduced the affidavit of the former district supervisor of the Associated Oil Company for whom the Appellant's deceased husband worked, that her deceased husband had been making at least $20,000.00 a year net during the seven years before his death. We quote from the affidavit of this former supervisor of the Associated Oil Company:

> "Mr. Whitfield had one of our most profitable distributorships and I would estimate his earnings after deducting costs of operations were in excess of Twenty Thousand Dollars, ($20,000.00).
>
> Seven years prior to his death, 1940 to 1948, were some of the most profitable years in the oil business in Kern County and in the Fresno District. In most of this period, the oil industry was under rationing and regulations of the Federal Price Control, and, therefore, all of our prices were very stable and there was no price cutting." (Thomas Murray's affidavit, Wholesale Supervisor for Associated Oil Company from 1940 to 1959, Clerk's Transcript of Dec. 18, 1967 page 26.)

The Government contends that there can be no evidence dehors the record on a motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure. However, as will be shown in our argument, this question of whether evidence de hors the record may be considered on a motion under Rule 35 to correct and reduce a sentence as still open in the Supreme Court of the United States and, further, all of the Circuit Courts of Appeal agree that such evidence dehors the record may come in to show that where a Government prosecutor willfully introduced unfounded and immaterial testimony to secure a conviction that a motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure should be granted.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred and committed reversible error in refusing to consider probation because the defendant plead not guilty, stood trial under her constitutional rights, and would not admit she had at least "done something wrong" before the District Judge ruled on her application for probation and sentenced her, thus, waiving her right to appeal to this Court and eventually to the United States Supreme Court.

2. The District Court misapplied the "Net Worth Method" determining income tax violations.

ARGUMENT

I

THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO VACATE, REDUCE, OR CORRECT HER SENTENCE UNDER RULE 35 OF FEDERAL RULES OF CRIMINAL PROCEDURE WHERE SUCH DENIAL WAS MADE ON THE ERRONEOUS GROUNDS THAT APPELLANT WAS NOT ENTITLED TO PROBATION AFTER A PLEA OF NOT GUILTY AND CONVICTION UNLESS SHE FIRST ADMITTED HER ALLEGED GUILT OR THAT SHE "HAD DONE SOMETHING WRONG" PRIOR TO PASSING ON HER APPLICATION FOR PROBATION AND SENTENCING.

1. **Refusal of the District Court to Grant Probation May Be Reversed on Appeal Where as Here There Was an Abuse of Discretion in Refusing to Grant Probation. Arbitrary or Capricious Action in Denying Probation by the District Judge Should Be Reversed on Appeal.**

> "order denying petition for suspension of sentence in connection with application for admission to probation is reviewable on single question of abuse of discretion." (Syllabus.) (*Burr v. U.S.*, 86 Fed. 2d 502, C.C.A. 7th Cir. 1936.)
>
> "The action of the Court in refusing to grant probation is not reviewable on appeal except possibly for arbitrary or capricious action on the part of the District Judge which amounts to an abuse of discretion." *(U.S. v. White,* 147 Fed. 2d 603, C.C.A. 9th Cir. 1945.)

2. **Congress Intended that Probation Was to Be Used to Give a Defendant Another Chance Where She Had a Good Previous Record.**

> "Probation, like parole, is 'intended to be a means of restoring offenders who are good social risks to society; *to afford the unfortunate another opportunity for clemency.*'" (Italics ours.) *(Toyo-*

saburo v. Korematsu v. U.S., 319 U.S. 432, 434, 63 S. Ct. 1124, 1126, 87 L.E. 1947.)

"Most important function to be performed by criminal law and its integral component, the prison system is rehabilitation of offenders." (Syllabus.) *(U.S. v. Benson,* 332 Fed. 2d 288, C.C.A. 2d Cir. 1964.)

"Probation or suspension of sentence is concerned with rehabilitation, not with determining guilt." *(Bernam v. U.S.,* 302 U.S. 211, 58 S. Ct. 164.)

3. Here the Defendant Was a First Offender, Had No Convictions or Arrests Until Her Conviction in This Case and Had a Good Reputation in Her Community.

Assuming that the defendant was guilty, she is now over sixty-five, was a hard working widow, and *had never been arrested or convicted of any offense during her sixty-five years of active life.*

We quote from the report of the probation officer—which although not in the record, as yet, was read into the record without objection at the hearing on the plaintiff's motion to reduce and correct her sentence.

"This is a 64-year-old *first offender.* She has a reputation of being a competent and astute businesswoman in her community of Delano. She is an industrious person and performs many of the menial tasks to save labor." (R.T. Dec. 18, 1967, lines 9-13.)

4. **The District Judge, the United States Attorney, and the Probation Officer All Erroneously Held that the Defendant Was Not Entitled to Probation Because She Had Plead Not Guilty, Stood Trial, and Still Maintained Her Innocence Prior to Her Application for Probation and Sentence.**

The statement of the United States Attorney at plaintiff's motion to reduce and correct sentence of December 18, 1967 clearly brings out this erroneous view of the law.

> "The sentence should not be reduced for the further reason that the defendant *persists in mouthing the same fabrication that she did at the time of her trial.* There has not been one single sign of rehabilitation shown by the defendant." (R.T. Dec. 18, 1967, page 6, lines 3-7.)

The probation officer recommended against probation solely on the basis that the plaintiff plead not guilty, went to trial, and at her hearing before the probation officer refused to say she committed perjury in previously denying her alleged guilt. We quote again from this report read into the record in open court without objection:

> "*Defendant continues to maintain* that her husband left her cash of approximately $109,000.00 at the time of his death and *that she is innocent* of the current violation. In view of the defendant's attitude toward her conviction we can see no rehabilitation purpose to probationary supervision." (R.T. Dec. 18, 1967, page 5, lines 18-24.)

The District Judge clearly relied upon and considered the probation officer's illegally based report. Finally the District Judge also followed this same illegal concept of the probation law and clearly abused

his discretion in refusing to consider probation because she plead not guilty, stood trial, continued to maintain her innocence, would not admit "she had done anything wrong," and insisted on her right to appeal to this Court. We quote the words of the District Judge:

> "The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here, and of course, that the probation officer's point, *that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate,* so there isn't anything he can do and, further, probation has to be based upon trust and confidence and *if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.*" (R.T. Dec. 18, 1967, page 12, lines 13-21.)

In other words the trial judge in stating "if she won't tell the truth to the probation officer or the court" and admit *"she had done something wrong"* prior to passing on her application for probation and sentence clearly abused his discretion and committed reversible error. It is impossible to distinguish this case from the words of the District Judge in *U.S. v. Wiley* from which we quote:

> "The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed." *(U.S. v. Wiley,* 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

Clearly the action of the District Judge in refusing to consider probation for the defendant because she stood on her constitutional rights and plead not guilty, stood trial, and thereafter refused to change her plea to either the probation officer or the Court or admit that she "had done something wrong," thus, destroying her right to appeal to this Court was a clear abuse of discretion on the part of the District Judge.

5. Denial of Defendant's Motion to Correct and Reduce Sentence Under Rule 35 Federal Rules of Criminal Procedure Is an Appealable Order.

Appellant had moved to correct and reduce her sentence, asking probation, under Rule 35 Federal Rules of Criminal Procedure on the grounds that the District Court had refused to grant her probation because she wouldn't admit her guilt, or at least that "she had done something wrong" before the District Court passed on her application for probation and sentenced her. (R.T. Dec. 18, 1967, page 121, lines 13-21.) This Court's denial of Appellant's motion under Rule 35 was an appealable order. *(Barton v. U.S.,* 375 U.S. 29, 84 S. Ct. 21, 11 L.E. 2d 1; *Heflin v. U.S.,* 358 U.S. 415, 79 S. Ct. 451, 3 L.E. 2d 403; *Yates v. U.S.,* 355 U.S. 66, 78 S. Ct. 128, 2 L.E. 2d 95.)

6. This Court Had the Power to and Should Vacate the Sentence and Remand the Case to the District Judge with Instruction that the Plaintiff's Refusal to Admit Her Alleged Guilt Before the District Court Had Passed on Her Application for Probation Is Not a Bar to Probation.

> "District Court's order judgment vacated and remanded for further proceedings not inconsistent with this opinion. The sentence is vacated and the case remanded to the District Court for

> further proceedings not inconsistent with this opinion." *(Thomas v. U.S.,* 368 Fed. 2d 941, C.C.A. 5th Cir. 1966.)

This Court should reverse the order of the District Court and remand the case to the District Court with clear instructions that Appellant has a constitutional and statutory right to ask for probation without first either changing her plea to guilty, "admitting that she had done something wrong," or waiving her right to appeal her conviction to this Court.

II

THE EVIDENCE PRESENTED BY THE GOVERNMENT AND ITS ERRONEOUS CONCEPTION OF THE NET WORTH METHOD AND ITS ERRONEOUS USE OF WITNESSES TO SUSTAIN THAT METHOD CONSTITUTED A DEPRIVAL OF APPELLANT'S CONSTITUTIONAL RIGHTS.

1. The Conviction and Sentence of Appellant Was Obtained Under the Dubious and Doubtful "Net Worth Method."

The conviction of Appellant was obtained by a skillful, experienced prosecutor against a young attorney under the "Net Worth Method." Men of long service with the Internal Revenue Bureau generally come to admit that many innocent persons have been illegally convicted under this method.

> "It has been my experience in and out of the Internal Revenue Service that the net worth method can be used to harm the innocent, as well as to unmask the guilty. It is my feeling that more taxpayers have been over-taxed through the net worth method than through any other audit procedure or technicality of law. The method is a dangerous one, and many incorrect deficiencies

are assessed." (The Journal of Taxation, September, 1961, by Fred R. Bohlen, Edited by Harry Graham Balter, LL.B., page 159.)

2. Under the "Net Worth Method" the Government Must Conclusively Prove Lack of Assets at the Beginning of the Period. Here the Government Utterly Failed to Do This.

It is a fundamental and unanimous rule of the Courts that the Government must prove beyond all reasonable doubt that a taxpayer had no other assets at the beginning of the period used in the net worth method.

> "Essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt. The judgment is reversed." *(U.S. v. Fenwick,* 177 Fed. 2d 488, 490, 492, 7th Cir. 1946.)
>
> *Fairchild v. U.S.,* 240 Fed. 2d 944, 5th Cir. 1957.

At Appellant's motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure, Appellant submitted an affidavit of the supervisor of the Associated Oil Company that defendant's husband was making $20,000.00 a year during the period 1941 to 1948 from his gasoline and oil business.

This contention of Appellant that her husband had given her a cash hoard of $109,000.00 was confirmed by the testimony of Hollis Roberts, one of the largest individual ranchers in Kern County and the Delano area, where Appellant resided after Mr. Whitfield's death, and that in 1948, shortly after Appellant's husband's death, Appellant had offered to loan him

$100,000.00 in cash (R.T. 492) and in 1957 actually loaned him $50,000.00 cash in the form of fifty $1,000.00 packages of currency.

The Government failed to produce the income tax reports of Appellant's husband for the years 1941 to 1948, but in lieu thereof introduced a calculation prepared by the Internal Revenue Service (Plaintiff's Exhibit No. 4) based on the total income taxes paid during the years 1940 to 1948.

However, on cross-examination on this Exhibit, Agent Jack L. Stewart, when asked if he knew what the actual gross receipts of Harold Whitfield were during the seven-year period, replied that he did not know what the actual gross receipts actually were and that the gross receipts in any one of those years could have been $50,000.00 to $100,000.00 (R.T. 132, line 5) and admitted that he had not taken into account the heavy depreciation of the Appellant's husband's abandonment of the huge wholesale gasoline complex after eight years of use. Clearly the Government legally failed to refute the undisputed testimony of Appellant, Mr. Roberts and the Supervisor of the Associated Oil Company.

> "Wherever net worth is sought to be applied to determine taxable income, cogency of government's proof depends upon effective negation of reasonable explanations by taxpayer inconsistent with guilt, and such refutation may fail when government does not track down relevant leads furnished by taxpayer." (Syllabus.) *(Fairchild v. U.S.,* 240 Fed. 2d 944, 5th Cir. 1957.)
>
> "When government relies upon circumstances of increased net worth and expenditures in ex-

cess of reported income to establish income tax evasion, basic net worth must be established." (Syllabus.) *(U.S. v. Fenwick,* 177 Fed. 2d 489, 7th Cir. 1949.)

"In prosecution for income tax evasion, government has burden of proof, and that burden never shifts to defendant." *(U.S. v. Fenwick,* 177 Fed. 2d 489, 7th Cir. 1949.)

3. The Government Must Prove the Taxpayer's Excess Income for the Year He Was Indicted for Failure to Pay His Income Tax. This the Government Completely Failed to Do.

It is clear under the authorities that even in the dubious and inaccurate "Net Worth Method" of proving income tax violations the Government must prove the income of the taxpayer for the year it is claimed the taxpayer failed to report his income. This is clear from all the decisions of which we quote but two:

"To prove fraud, however, the Government was bound to establish by clear and convincing evidence that such increases as were reflected by its *computations,* represented then *current, taxable income.* * * *" *(Holland v. U.S.,* 348 U.S. 121, 1963; 75 S. Ct. 127.)

"To prove taxpayer's fraud in attempting to evade tax, in order to avoid effect of limitations, under the net worth method, government was bound to establish by clear and convincing evidence that such increases in net worth as were reflected by its computations, represented then *current, taxable income,* and by the same degree of proof to show that such increases were not attributable to amounts earned in prior years,

as claimed by the taxpayer." (Syllabus.) *(Fairchild v. U.S.,* 240 Fed. 2d 944, 5th Cir. 1957.)

This the Government failed to do.

In the instant case, the Government contended that the Appellant failed to report on her 1958 income tax the sum of $32,627.44, net in 1958 from a small motel in the little town of Delano, California. This was over two years after U.S. Highway 99, the major highway through Delano, had been moved over ten (10) blocks west of Appellant's motel. Earl W. Taylor, the District Traffic Engineer for District VI of the California Division of Highways (R.T. 271, line 24 and 272, line 16), testified that the official date of completion of the freeway was August 3, 1956, and that the freeway was actually opened on June 22, 1956 (R.T. 274, line 9 and 275, line 11), and the results of those counts were in part indicated on Defendant's Exhibit C. The figures on Defendant's Exhibit C show that highway traffic dropped 80 per cent after U.S. Highway 99 by-passed Appellant's motel.

To further support his ridiculous and false contention that Appellant made $32,627.44 in 1958, net from her small motel two years after the highway moved over one-half mile away, the Government attorney introduced the testimony of three maids and a Mr. Peterson with respect to motel occupancy. Mr. Peterson testified that he stayed at the Hal-Mar Motel for approximately one month during 1954 (R.T. 499, lines 14-19) and that at that time the motel was approximately half full during the week

and it appeared to be completely full on weekends. (R.T. 500, lines 12-18.) It is difficult to understand what, if any, inference the jury could draw from the testimony of Mr. Peterson as to occupancy during one month *in 1954* with respect to occupancy during 1958 and 1959, particularly *when it is undisputed that in 1956 the traffic on the highway on which the motel was located was diverted to a newly constructed freeway to by-pass the City of Delano over one-half mile away* and the traffic count in the area of the motel decreased by approximately 80 per cent thereafter.

A second witness called by Appellee with respect to occupancy of the motel was Anna May Smith, who was employed by Appellant *as a maid from January through November of 1955, with* respect to occupancy in 1958 and 1959. (R.T. 202, lines 10-21 and 204, lines 19-24.) The weight of her testimony as to occupancy of the motel in 1955 with respect to occupancy in 1958 and 1959 is subject to the same criticism raised with respect to Mr. Peterson's testimony, in that *it deals solely with a period prior to the Delano freeway by-pass in 1956.* The above evidence, not being connected up with the tax years in question, 1958 and 1959, cannot be given any weight in arriving at a judgment in this case.

The remaining two witnesses who testified with respect to occupancy of the motel were employed by Appellant during 1958. The first of these two witnesses was Shirley Collins, who did maid work for Appellant at the Hal-Mar Motel from July through

December of 1958, and from August through December of 1959. Mrs. Collins testified that during part of the summer practically all of the thirty units of the motel were occupied but that during the fall the occupancy slacked off to about half. (R.T. 216, lines 12-25.)

The final witness to testify with respect to occupancy of the motel was Consuela C. Ramirez, who contradicted Shirley Collins and also worked as a maid at the Hal-Mar Motel only during the month of October, 1958. (R.T. 220, line 21 to 221, line 6.) Her testimony was that about half of the units were occupied on weekdays and practically all of the units were occupied on weekends during the month of October, 1958. (R.T. 221, lines 10-21.)

The introduction of such remote, erroneous, and immaterial evidence clearly shows that the clever method used by Government counsel was simply an attempt to hoodwink the jury and the Court and as such, as will be later shown, constituted a violation of the due process clause of the Constitution.

To meet this illegal and immaterial evidence at the time of Appellant's motion to correct and reduce sentence on December 18, 1967, Appellant introduced the affidavit of Charles Franklin, a certified public accountant and partner in the nationally known firm of Giffen, Hills & Carruth, who is a recognized motel accountant, and who stayed at the Appellant's motel in August and April of 1958, and April and October of 1959 (R.T. 461, line 4 and 462, line 5), both in the years of alleged income tax evasion and over a

year after U.S. Highway 99 had by-passed Appellant's motel, who in his affidavit stated:

> "From the conditions relating to occupancy at the Hal-Mar Motel in the years 1958 and 1959, as I observed them as a customer at the said motel, it is my considered opinion and belief that Mrs. Martha Whitfield, as motel operator, would be barely breaking even, if not losing money, on her motel operations during that period." (Charles H. Franklin's affidavit, Certified Public Accountant, Giffen, Hills & Carruth.) (Clerk's Transcript, page 26.)

We call the Court's attention to certain untrue, irrelevant, and unbelievable testimony offered by the Government in the person of Arlene Lee Smith, who was called as a Government witness, who had been a teller in the First National Bank, later the United California Bank, in Delano, from 1952 to 1963.

She testified on direct examination to the effect that Martha Whitfield, during those years, first came into her bank *in 1952* and called at her teller's window two or three times a week, and would bring in a small amount of checks and cash and ask for large currency, 100's, 50's, and some 20's which she would then take out of the bank and occasionally, not often, make a deposit. (R.T. 513, lines 1-25.) She was asked this question: "She would bring in $300 to $500 each time (R.T. 514, line 19), weekly, over a period of 11 years?" Mrs. Smith's answer was, "Yes." (R.T. 515, lines 14-19.)

On cross-examination she stated, "She would come in 2 or 3 times weekly; she would call at my window

and get $900 or $1,500 a week in currency." (R.T. 517, lines 14-19.) She admitted that $900 a week for 52 weeks would total $46,800 for the year; and at $1,500 a week, would total $75,000; and over a ten-year period at two to three times a week, would total $468,000 and $750,000, respectively. (R.T. 519, lines 1-21.)

Of course, such testimony is absurd and unbelievable. Furthermore, by her own testimony she never entered a single deposit for Martha Whitfield until 1959 or 1960, as is shown by Appellant's Exhibit Q and Appellant's Exhibit R, each of which had over 200 entries.

The testimony of Arlene Lee Smith was refuted by Molly Gregory, who was also a teller at the United California Bank in Delano for over 13 years (R.T. 476, line 19), who was called by the Appellant, and whose name or initials, M.G., were posted in most places in Appellant's Exhibit Q and Appellant's Exhibit R (R.T. 479, line 14), sometimes two and three times a day, who completely disputed the practices described by Mrs. Arlene Lee Smith.

4. Evidence Dehors the Record Should Be Considered Under Rule 35, Federal Rules of Criminal Procedure.

The decisions of the circuit courts are not unanimous on whether evidence dehors the record can be reviewed in a motion under Rule 35, Federal Rules of Criminal Procedure. However, the Supreme Court says this question is still open and undecided.

> "Whether Rule 35 covers the broader field of collateral attack, where a hearing to consider

matters dehors the record we do not here determine." *(Heflin v. U.S.,* 358 U.S. 415, 422, 79 S. Ct. 451 at 453, footnote 7, 1963; 3 L.E. 2d 407.)

We feel that equity demands that competent evidence outside the record should be considered and that the affidavit of the Supervisor of the Associated Oil Company and the testimony of Mr. Franklin, the Certified Public Accountant, that Appellant's motel made nothing in 1958 and 1959 should be considered just as the courts allow evidence dehors the record to show that a defendant's plea of guilty was obtained by promises of immunity.

5. Deliberate Suppression of Evidence or Use of Untrue Evidence, Deception of the Jury by a Government Prosecutor Constitutes a Violation of Due Process Under Amendment XIV to the Constitution of the United States.

Here the Government prosecutor had used witnesses to testify as to the conditions of Appellant's motel in 1952 and earlier many years before the year in which she was accused of concealing her income and many years before U.S. Highway 99 by-passed her motel and by testimony of bank tellers who didn't even handle her deposits. Other immaterial and irrelevant evidence was introduced. Such conduct we submit constituted deprivation of due process under the Constitution of the United States.

"Grounds that have been recognized in the cases for a motion to correct, vacate, or set aside a judgment include the following: double sentence or punishment, coercion into pleading guilty, the use of perjured testimony. The de-

liberate suppression by the prosecution of evidence favorable to the plaintiff may constitute a denial of due process so as to be grounds for the statutory motion." (50.139 Cyc. Fed. Procedure.)

"The requirement of due process cannot be deemed to be satisfied if a state has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through deliberate deception of court and jury." *(Mooney v. Hohan,* 294 U.S. 103, 55 S. Ct. 34 Article 342.)

Dated, Fresno, California,
March 21, 1968.

Respectfully submitted,
LUCIUS POWERS,
CLAUDE L. ROWE,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLAUDE L. ROWE,
Attorney for Appellant.